

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MICHAEL STEPSKI, KIRSTEN STEPSKI, Wife,
GEAL RODERICK AND BENJAMIN SCHOBBER,

Plaintiffs,

-against-

The M/V NORASIA ALYA, her owners,
operators, etc., and MS "ALENA"
SCHIFFFAHRTSGESELLSCHAFT mbH & CO. KG,
PETER DOHLE SCHIFFFAHRTS-KG,

06 Civil 1694
(KMK)

Defendants.

-----X
PLAINTIFFS' RESPONSE TO DEFENDANTS'
RULE 56.1 STATEMENT IN SUPPORT OF
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

In response to defendants' submissions 1, 2, 3:

Objection.

Irrelevant to issue. Singleton Affidavit is an incompetent source. Exhibits are without proper foundation.

In response to defendants' submissions 4, 5, 6, 7:

Denied.

Incomplete, selective, inaccurate and misleading. (See plaintiffs' submissions 1, 2, 3 and 4.)

In response to defendants' submissions 8, 10, 11, 12:

Plaintiffs do not contest the content, but object to their relevance and so move to strike.

In response to defendants' submission 9:

Denied. See plaintiffs' submission 6.

In response to defendants' submission 13:

Denied. Defendants cite in support (a) "ship's particulars" which is hearsay and irrelevant; (b) Kowalewski "declaration" Exhibit 5 is vague, incompetent and conclusory. Plaintiffs move to strike Exhibit 5.

In response to defendants' submissions 14, 15, 16, 17:

Denied. That NORASIA ALYA had such capabilities is irrelevant. The issue is were they used. The deck log and Kowalewski's examination before trial show that they were not.

In response to defendants' submission 18:

Plaintiffs do not contest the content, but object to its relevance to the issues and so move to strike.

In response to defendants' submission 19:

Denied. There are no confirming entries in NORASIA ALYA deck log.

In response to defendants' submissions 20, 21:

Denied. Kowalewski "declaration", Exhibit 5 is incompetent and untrustworthy.

In response to defendants' submission 22, 24:

Plaintiffs do not contest the content, but object to relevance and move to strike.

In response to defendants' submission 23:

Denied. The referenced Captain's Standing Order (Defendants' Exhibit 6) is dated "at sea 30 June '04." The collision was May 22, 2004.

In response to defendants' submission 25:

Denied. Incompetent. Kowalewski cannot testify to events when he was off bridge.

In response to defendants' submissions 26, 27, 29:

Denied. The watch left the bridge for "meals and toilet." 1100 to 1300 was meal time. Fog conditions were not constant.

In response to defendants' submission 28:

Denied. These are questions of fact. The log does not confirm allegations regarding sounding fog signals.

In response to defendants' submission 30:

Plaintiffs do not contest the content, but object to its relevance and move to strike.

In response to defendants' submission 31:

Denied. Given the undermanning of the bridge and the multiple tasks involved, the radars could not be monitored as required by COLREGS.

In response to defendants' submission 32:

Denied. Vague and conclusory, without times and particulars, no relevance is demonstrated.

In response to defendants' submissions 33, 34:

Denied. As a matter of law, COLREGS 5 was violated. There was no lookout and so none to "supplement."

In response to defendants' submissions 35, 36, 37, 38:

Denied. There is no probative proof in the present record.

In response to defendants' submission 39:

Denied. The NORASIA ALYA's failure to target and track AVA CLAIRE on its radar is proof of its negligence, not that there was no target.

In response to defendants' submission 40:

Denied. Without proper foundation. Since fog conditions varied, visibility limits remain a question of fact.

In response to defendants' submission 41:

Denied. The statement "at about 1400" is incorrect. See defendant's Exhibit: United States Coast Guard Record of Urgent Transmission.

In response to defendants' submissions 42, 43, 44, 45:

Denied. Incompetent as based on "declaration."

In response to defendants' submissions 46 through 65:

Plaintiffs object generally:

- (1) They are beyond the permitted motion.
- (2) The submissions are based on Attorney Unger's affidavit which is inadmissible.
- (3) Mitigation of damages and determination of Jones

Act/seaman status are fact specific and involve questions of fact.

In response to defendants' submissions 46, 47, 48, 49, 50:

Denied based on truncated citations to depositions and include counsel's comment.

A fair reading of the full materials show that plaintiffs Stepski, Roderick and Schober suffer from post-traumatic stress disorder, described by Dr. Merriam on examination before trial as a "...disorder is one that tends to be indelible. People generally do not return to their former selves and there is typically a pattern of recurrence during life stress..."

(Merriam Deposition, p. what page??

See also, pgs. 31 lines 11-16; 60, 61, 71.

The plaintiffs have testified that they are without medical health insurance and have no financial resources. (Merriam Deposition, pgs. 103-104)

Questions of fact are involved.

In response to defendants' submissions 51, 52:

Admit.

In response to defendants' submissions 53, 54, 55:

Denied.

Dr. Merriam's testimony must be read as a whole. Counsel's selection of sound bites is misleading.

In response to defendants' submissions 56, 57, 58:

Denied.

Dr. Small's examination before trial must be read in full context. Use of terms of characterization, e.g. "unilaterally elected", "successfully treated", "optimistically" are beliefs of Unger Affidavit, not facts.

In response to defendants' submissions 59, 60:

Denied, without foundation. Objectionable in form, assumes plaintiffs had legal obligations.

In response to defendants' submissions 61, 62, 63, 64:

Denied; without basis, bad in form, not factual, but contain attorney's commentary.

In response to defendants' submission 65:

Denied. Object. The question of "cure" was never part of the issues joined, nor raised.

DATED: NEW YORK, NEW YORK
February 17, 2009

Yours, etc.

THOMAS H. HEALEY, ESQ.
Attorney for Plaintiffs

BY: 

Thomas H. Healey (THH-3093)
17 Battery Place - Suite 605
New York, New York 10004
(212) 943-3520

TO: BLANK ROME LLP
Attorney for Defendants
405 Lexington Avenue
New York, New York 10174

FREEHILL, HOGAN & MAHAR
80 Pine Street
New York, New York 10005